TEONG LUNG CHIONG & ORS

v.

PP

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NOS: Q-05-17-96, Q-05-20-96 & Q-05-21-96]
7 MARCH 2003

EVIDENCE: *Confession - Use against co-accused - Whether cautioned statements given by accused could be treated as confession against other accused - Evidence Act 1950, s. 30 - Whether trial judge erred in application*

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Cautioned statements given by accused - Whether could be treated as confession against other accused - Whether other independent evidence ought to exist to support murder conviction*

The three accused were convicted of murdering one Hew Leh Poh ('the deceased') and sentenced to death under s. 302 of the Penal Code by the High Court. The deceased had been kidnapped and raped prior to her death. Whilst the trial judge did not categorically indicated that he applied the provisions of s. 30 of the Evidence Act ('the Act'), it appeared that he had considered the contents of each of the cautioned statements given by the three accused during the course of the police investigation as a confession as against the other appellant. Each of them appealed to this court against the said decision.

Held:
Per Mohd Noor Ahmad JCA

[1] The cautioned statements made by each of the accused did not tantamount to a confession of the murder, though the 2nd and 3rd accused did confess to raping the deceased. Thus, the said statements could not merit any consideration under s. 30 of the Act. Even assuming that the cautioned statements tantamount to a confession of murder, there ought to be other evidence independent of the said statements sufficient to support the conviction of murder. (p 175 b-c)

[2] In relation to the first accused, whilst there was evidence that he had written the ransom notes, was caught collecting the ransom money and co-operated with the police which led to the discovery of the bones of the deceased and the arrests of the other accused, these were insufficient to found a conviction of murder against him. (p 175 d)

[3] The prosecution had failed to prove the guilt of each of the accused beyond a reasonable doubt on the charge before this court. Whilst other offences were highlighted in the cautioned statements, they could not be considered in this forum. (p 176 b & d)

[Appeals allowed; conviction and sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ketiga-tiga tertuduh disabitkan dengan kesalahan membunuh Hew Leh Poh ('simati') dan dijatuhkan hukuman mati di bawah s. 302 Kanun Keseksaan oleh Mahkamah Tinggi. Simati telah dicolek dan dirogol sebelum kematiannya. Manakala hakim bicara tidak menunjukkan bahawa beliau memakai peruntukkan di bawah s. 30 Akta Keterangan 1950 ('Akta'), namun didapati bahawa beliau telah mengambilkira kandungan setiap kenyataan beramaran yang telah diberikan berasingan oleh ketiga-tiga tertuduh semasa siasatan polis sebagai pengakuan salah terhadap tertuduh yang satu lagi. Ketiga-tiga tertuduh telah membuat rayuan berasingan terhadap keputusan tersebut.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Kenyataan beramaran yang telah dibuat oleh setiap tertuduh tidak merupakan pengakuan salah terhadap pembunuhan, walaupun tertuduh kedua dan ketiga telah mengaku merogol simati. Oleh yang demikian, kenyataan-kenyataan tersebut tidak boleh ditimbangkan di bawah s. 30 Akta. Jikapun dianggapkan bahawa kenyataan-kenyataan beramaran diterima sebagai pengakuan salah melakukan pembunuhan tersebut, perlu wujud bukti yang lain dan terasing daripada kenyataan tersebut yang berupaya menyokong sabitan membunuh.

[2] Berkenaan dengan tertuduh pertama, walaupun terdapat bukti bahawa dia telah menulis nota ugutan, ditangkap mengambil wang ugutan dan telah bekerjasama dengan polis yang membawa kepada penemuan tulang-tulang simati dan seterusnya penangkapan tertuduh-tertuduh yang lain, ia tidak mencukupi untuk mensabitkannya dengan kesalahan membunuh.

[3] Pihak pendakwa gagal untuk membuktikan kesalahan setiap tertuduh di luar keraguan munasabah atas pertuduhan di hadapan mahkamah ini. Manakala terdapat kesalahan-kesalahan lain yang diutarakan dalam kenyataan-kenyataan beramaran berkenaan, namun ia tidak boleh dibicarakan di forum ini.

Rayuan dibenarkan; sabitan dan hukuman diketepikan.]

Case(s) referred to:
Herchun Singh & Ors v. PP [1969] 2 MLJ 209 ***(refd)***
Sivalingam v. PP [1982] CLJ 406; [1982] CLJ (Rep) 330 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 30

For the appellants - Joseph CC Tang; M/s Tang & Co
For the respondent - Ishak Mohd Yusof DPP

[Appeal from High Court, Sibu; Criminal Trial No: 4-1993]

Reported by M Maheswaran

JUDGMENT

Mohd Noor Ahmad JCA:
The appellants were convicted and sentenced to death for murder. The charge reads:

> That you, on the 14th day of July, 1991, between 2.00 p.m. to 5.00 p.m. in a hut at 81/2 km, Teku Road, Sibu, in the State of Sarawak, in furtherance of the common intention of you all, committed murder by causing the death of Hew Leh Poh (f), and you thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same Code.

Briefly, on the evening of 14 July 1991 the deceased went missing whilst walking towards the direction of her home. Two days later a missing person report was lodged with the police. The initial investigations by the police did not produce any positive result. However, about two months later, the deceased's elder sister received some letters from one who signed himself as Steven Ting demanding a sum of money ranging from RM10,000 to RM15,000 for the return of the missing girl. The letters were passed to the police. On the advice of the police, another sister of the deceased was instructed to deliver RM3,000 in marked notes to the address given by Steven Ting at P.O. Box 947 located at the Sibu post office. A police surveillance was put into motion, during which about two days later the 1st appellant came on a motor-cycle and collected the money from the said P.O. Box and thereafter rode off. The registration of

the motorcycle based on its number as noted by the police was traced to the 1st appellant. On 14 October 1991 the 1st appellant was arrested. Upon interrogation about the missing girl the 1st appellant led the police to the discovery of the skeletal remains of a human being at kilometer 37 Durin Road, Sibu which were eventually identified to be that of the deceased. The cause of the death was certified to be "indeterminable but the ligature with the reap knot suggests strangulation". Subsequently, the 2nd and 3rd appellants and another person were arrested. In the course of investigation they each gave a cautioned statement to the police. The cautioned statements were tendered by the prosecution and after the trial-within-the-trial they were admitted except that of the other person arrested who was acquitted and discharged without his defence been called.

In the respective cautioned statements, the 1st appellant admitted having invited the deceased to go for a joy ride in a car driven by the other person with the three appellants inside. He also admitted having sent the ransom notes. However, he denied that he raped the deceased but stated that the deceased was raped by the others and thereafter, the 2nd appellant and the other person strangled her to death with nylon rope. The 2nd appellant admitted having raped the deceased and stated that all of them took turn to rape her. He denied that he strangled the deceased but stated that the strangulation was done by the 3rd appellant and the other person. The 3rd appellant also admitted having raped the deceased and denied that he strangled her but pushed the blame for the strangulation on the 1st appellant and the other person.

It is manifestly evident that the conviction of the appellants for murder pitched on common intention is based solely on the combined effect of their cautioned statements. In their respective cautioned statement each appellant pushed the blame for the act of strangulation of the deceased to death on the others and maintained that he did not participate in the act of strangulation but was merely watching the killing helplessly.

A scrutiny of the judgment reveals that the learned judge had gathered the common intention to murder the deceased by inferences, mainly, from (i) the conduct of each appellant in not preventing the others from strangling the deceased to death but simply watching the deceased being slowly strangled and choked to death, (ii) the fact that the deceased was earlier raped by each of them and that they would be in trouble if they were to let the deceased free and therefore, there was a need to kill the deceased and (iii) their participation in actively assisting each other in the clumsy disposal of the deceased's body. Although the learned judge did not categorically indicate that he applied the

provisions of s. 30 of the Evidence Act 1950 ('the Act'), in reality, he took into consideration the contents of each of the cautioned statements as confession as against the other appellants.

In our view, with due respect, the learned judge erred in his approach leading to the conviction on the following grounds:

Firstly, the cautioned statement of each appellant does not tantamount to confession of murder, though in the cases of the 2nd and 3rd appellants they are a confession to having committed rape on the deceased. Therefore, they are not a confession for the offence of murder as charged to merit any consideration under s. 30 of the Act. Secondly, even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder. In this case there was no such evidence. In respect of the 1st appellant, although there was evidence against him that he wrote the ransom notes, he was caught collecting part of the ransom money, part of which was subsequently found in his possession, and he cooperated with the police leading to the discovery of the deceased's bones and the arrest of the other appellants, to our mind, that evidence is not sufficient to found a conviction of murder against him. In *Hercun Singh & Ors v. PP* [1969] 2 MLJ 209 at p. 210 the Federal Court held:

> ..., we would express our qualified agreement with the judgment of Ismail Khan J (as he then was) in *Public Prosecutor v. Lai Pong Yuen* [1968] 1 MLJ 12 at page 14 where he followed *Bhuboni Sahu v. The King* AIR [1949] PC 257 and *Kashmira Singh v. State of Madhya Pradesh* AIR [1952] SC 159, but not in the sense expressed by the learned Chief Justice in *Gunadhar Das v. State* AIR [1952] Cal. 618. In *Lai Pong Yuen* the judge said: "It is clear from a long line of authorities that a confession of a co-accused is only an element in the consideration of other evidence, which evidence must be sufficient to support a conviction." In *Gunadhar Das* it was said similarly: "In short the conviction must be based on the other evidence. The confession can only be used to help to satisfy a court that the other evidence is true". In our judgment however, the proper interpretation of seciton 30 is that of Bose J in *Kashmira Singh* as follows:
>
> > The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independenly of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call

in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

It is a cardinal principle in criminal law that it is the burden on the prosecution to prove the guilt of the accused beyond reasonable doubt. Having scrutinized the evidence in this case we are satisfied that the prosecution failed to do so.

We do realize that the trial was conducted with the aid of assessors. And indeed we do appreciate the grief and tears of the deceased's relatives over the loss of their loved one. Our sympathies are with them. Also, we are fully aware of the public's disapproval and anger as to the cruel manner the deceased met with her death, as revealed in the cautioned statements. However, in the interest of justice, we have no choice but, with the greatest reluctance, to allow the appeals.

Although other offences have been revealed in the respective cautioned statements, on decided authorities, we are constrained from considering and convicting them for the offences (see *Sivalingam v. PP* [1982] CLJ 406; [1982] CLJ (Rep) 330). This is within the realm of the discretion of the Attorney-General to consider.

Therefore, each appeal is allowed. Conviction and sentence are set aside.

On the disposal of the exhibits we confirm the order made by the learned judge (re Record of Appeal Vol. II at p. 809).